Privy Council Appeal No. 4 of 1988

Jamaica Mutual Life Assurance Society *Appellant*

v.

(1) Hillsborough Ltd.
(2) Robert Bolt
(3) Lancelot P. Reynolds and
(4) Royal Bank Trust Co. Ltd. *Respondents*

FROM

THE COURT OF APPEAL OF JAMAICA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 24TH JULY 1989

Present at the hearing:-

LORD BRIDGE OF HARWICH
LORD ACKNER
LORD GOFF OF CHIEVELEY
LORD JAUNCEY OF TULLICHETTLE
LORD LOWRY

*[Delivered by **Lord Jauncey of Tullichettle**]*

This appeal concerns the enforceability of restrictive covenants in titles to land in Jamaica. The appellants are the registered owners in fee simple of lands extending to some six and three quarter acres described as "part of the Constant Spring Estate in the parish of St. Andrew". The appellants acquired title to these lands by Instrument of Transfer registered on 24th August 1981 and the Certificate of Title bears that their estate is "subject to the incumbrances notified hereunder" of which the first and second are in the following terms:-

> "1. The land above described, (hereinafter called 'the said land') shall not be subdivided into lots of less than One Acre each;
>
> 2. No trade or business shall be carried on the said land or any part thereof."

The first and second respondents are the registered owners of other lands forming part of the Constant Spring Estate and their Certificates of Title bear that their estates are subject to incumbrances of which the first two are identical to those in the appellants' title. The third and fourth respondents are the registered

owners of land forming part of Norbrook in the same parish and their Certificates of Title bear that their estates are subject to a number of incumbrances of which two are in very similar, but not absolutely identical, terms to those in the appellants' title.

The relevant conveyancing history may be summarised as follows. By Certificate of Title dated 26th March 1913 there was registered in vol. 89 folio 45 in the name of Arthur Wildman Farquharson a number of parcels of land in the parish of St. Andrew including *inter alia* (first) a parcel known as Norbrook containing some 942 3/4 acres, (second) a parcel known as Constant Spring Estate containing some 1482 3/4 acres, and (third) a parcel which was formerly part of Constant Spring Estate but was then known as Retreat containing some 68 3/4 acres. By Instrument of Transfer dated 15th February 1952 Harold Herbert Dunn, Richard Farewell Williams, Gladys May Farquharson and George Forbes Milne (Dunn et al) transferred to Cecil Alexander DeLisser some 65½ acres of Norbrook subject to the incumbrances to which their Lordships have already referred. The lands now owned by the third and fourth respondents are part of the said 65½ acres.

By Instrument of Transfer dated 6th August 1956 Dunn et al transferred to Cecil Boswell Facey the land described in the first schedule and subject to the restrictive covenants mentioned in the second schedule. The first schedule and the relevant parts of the second schedule were in the following terms:-

> " FIRST SCHEDULE
>
> ALL THOSE parcels of land being LOTS TWO and THREE shown on the plan thereof hereunto annexed marked 'A' containing respectively SIX ACRES THREE ROODS AND EIGHTY-EIGHT HUNDREDTHS OF A PERCH and SEVEN ACRES TWENTY-FOUR PERCHES and SEVEN-TENTHS OF A PERCH and being part of the land comprised in Certificate of Title registered at Volume 89 Folio 45 of the Register of Titles.
>
> SECOND SCHEDULE
>
> (a) THE LAND the subject of this Transfer shall not be sub-divided into smaller lots for a period of seven years from the Twenty-fourth day of September One thousand nine hundred and fifty-four and after such time has expired shall not be sub-divided into Lots of less than one acre each.
>
> (b) No trade or business shall be carried on on the said land or any part thereof."

The lands now owned by the first and second respondents are part of lot two. By Instrument of

Transfer of the same date Dunn et al transferred to Maurice Williams Facey the land described in the first schedule subject to the restrictive covenants mentioned in the second schedule which restrictive covenants were in turn identical to those in the transfer to Cecil Boswell Facey. The first schedule was in the following terms:-

" FIRST SCHEDULE

ALL THAT parcel of land being LOT ONE shown on the plan thereof hereunto annexed marked 'A' containing by survey SIX ACRES THREE ROODS NINETEEN PERCHES AND NINETENTHS OF A PERCH and being part of the land comprised in Certificate of Title registered at Volume 89 Folio 45 of the Register of Titles."

The appellants now own the land described in the first schedule. It appears that on 6th August 1952 Dunn et al executed two further Instruments of Transfer relating to (1) an area of $285\frac{1}{4}$ acres, and (2) an area of $1^{3}/_{4}$ acres. Both transfers were said to be subject to restrictive covenants set out therein but since neither the relevant Instruments of Transfer nor the Certificates of Title were produced it is possible neither to ascertain where the lands were nor what were the terms of the restrictive covenants.

The appellants were anxious to develop their land as a multi-unit residential complex and in 1983 initiated an action by Notice of Motion moving the court in terms of section 5 of the Restrictive Covenants (Discharge and Modification) Act 1960 to declare (a) whether all the parcel of land now known as 13a Norbrook Road, part of Constant Spring Estate and being the land comprised in Certificate of Title registered at Volume 1161 Folio 246 of the Register Book of Titles is affected by the restrictions imposed by Instrument of Transfer numbered 121689 and dated the 6th day of August 1956; and (b) 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?

A five day hearing took place before Malcolm J. in May and October 1984 in the course of which affidavit evidence was produced on behalf of the appellants and on behalf of the first, second and fourth respondents, all parties being then represented by counsel. On 14th February 1986 Malcolm J. delivered an oral judgment in which he found that the covenants in the appellants' title ran with the land and enured to the benefit of the respondents and their successors. In the Court of Appeal the respondents did not appear. The appeal was dismissed and Carey J.A. with whom Kerr P. (Ag.) and White J.A. agreed, concluded that the covenants in the appellants' title were annexed to the land retained by Dunn et al when they transferred Lot One to Maurice

Williams Facey and that the benefit thereof enured to the respondents as the successors in title of Dunn et al. Alternatively Carey J.A. concluded that the original owner of the land in the 1913 Certificate of Title had created for the three large areas to which their Lordships have already referred a scheme of development by imposing covenants upon the sale of various plots to various purchasers.

Before this Board, as in the Court of Appeal, the respondents were not represented and Mr. Muirhead Q.C., whose able argument greatly assisted their Lordships, was at a disadvantage in having no argument to respond to. He submitted first that the covenant in the appellants' title was personal to the covenantee and that the benefit thereof was not annexed to any land and second that the evidence did not disclose the existence of any scheme involving reciprocity of obligations.

In relation to the appellants' first submission Carey J.A. after observing that annexation was not constituted solely by use of a prescribed formula but could be so constituted by intention ascertained from the surrounding facts at the time of the sale went on to say:-

> "So far as the appellant's plot of land is concerned, when the original owners sold that land to Maurice Williams Facey and imposed restrictive covenants thereon, their intention clearly was to protect or benefit the land retained in certificate of title volume 89 Folio 45. It cannot be in dispute that the restrictive covenants thus imposed run with the land ..."

Their Lordships respectfully disagree with the first sentence of this passage. There were in the Instrument of Transfer to Maurice Williams Facey no words stating that the restrictions therein were intended for the benefit of any land retained by Dunn et al. The fact that land was retained by the vendors appears from references in the Register of Title to subsequent transfers by them during the summer of 1957. Whether land remained in their hands thereafter is not known. Furthermore the Instrument of Transfer to Cecil Boswell Facey contains no express assignment by Dunn et al of any rights granted to them by Maurice Williams Facey's covenants and there is no evidence of any subsequent assignment of such rights to any of the respondents' predecessors in title.

In *Renals v. Cowlishaw* [1878] 9 Ch.D. 125 Hall V.-C. at page 130 said:-

> "... that in order to enable a purchaser as an assign (such purchaser not being an assign of all that the vendor retained when he executed the conveyance containing the covenants, and that conveyance not

> shewing that the benefit of the covenant was intended to enure for the time being of each portion of the estate so retained or of the portion of the estate of which the plaintiff is assign) to claim the benefit of a restrictive covenant, this, at least, must appear, that the assign acquired his property with the benefit of the covenant, that is, it must appear that the benefit of the covenant was part of the subject-matter of the purchase."

In *Rogers v. Hosegood* [1900] 2 Ch. 388 Collins L.J., at page 407-8 said:-

> "When, as in *Renals v. Cowlishaw*, there is no indication in the original conveyance, or in the circumstances attending it, that the burden of the restrictive covenant is imposed for the benefit of the land reserved, or any particular part of it, then it becomes necessary to examine the circumstances under which any part of the land reserved is sold, in order to see whether a benefit, not originally annexed to it, has become annexed to it on the sale, so that the purchaser is deemed to have bought it with the land ..."

Both *Renals v. Cowlishaw* and *Rogers v. Hosegood* were referred to with approval in *Reid v. Bickerstaff* [1909] 2 Ch. 305 where Cozens-Hardy M.R. in the context of a submission that the benefit of a covenant was annexed to adjoining lands of the vendors said at page 321:-

> "As to the second proposition the plaintiffs have a more plausible case, but I think they fail in establishing it. It is plain that they are not assignees of the covenant, of the existence of which they were not aware. It is equally plain that there is nothing in the deed of 1840, or in any document prior or subsequent thereto, to indicate that the covenant was entered into for the benefit of the particular parcels of which the plaintiffs are now owners. I cannot hold that the mere fact that the plaintiffs' land is adjacent and would be more valuable if the covenant were annexed to the land suffices to justify the Court in holding that it was so annexed as to pass without mention by a simple conveyance of the adjacent land."

Applying the principles to be derived from these three cases to the matters to which their Lordships have just referred their Lordships consider that Carey J. was mistaken in concluding that the covenant in the appellants' title was annexed to any land.

In relation to the appellants' second submission Carey J.A. concluded that the conveyancing history of the three parcels of land to which their Lordships have referred in the 1913 Certificate of Title was "that this vast estate was prior to the sale to the present parties laid out in lots subject to restrictions which were

imposed on them all. The imposition of the restrictions is explicable only on the basis of some general scheme of development". This conclusion is not supported by the evidence. Mr. Dennis Everard Morais, a director of the first respondent, stated in his affidavit that "between the date of issue of title in Volume 89 Folio 45 aforesaid and 1924 there were a number of transfers by the registered proprietor which were not expressed to be subject to any restrictive covenants". The accuracy of this statement is confirmed by an examination of folio 45 but the matter goes further because it appears therefrom that Instruments of Transfer of parcels of land which contained no restrictive covenants were being executed at least until 1938. Other Instruments of Transfer were apparently executed containing restrictive covenants whose terms were not disclosed. In that situation their Lordships find it quite impossible to say that there is evidence of the existence, since 1913, of a building scheme in relation to the three parcels of ground above referred to. The only area of ground in relation to which it might be argued that a building scheme was established is that consisting of the three lots transferred to Cecil Boswell Facey and Maurice Williams Facey by the two transfers of 6th August 1956. Their Lordships asked Mr. Muirhead to address them on this point.

It is now well established that there are two pre-requisites 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 *Reid v. Bickerstaff supra* Cozens-Hardy M.R. at page 319 said:-

> "What are some of the essentials of a building scheme? In my opinion there must be a defined area within which the scheme is operative. Reciprocity is the foundation of the idea of a scheme. A purchaser of one parcel cannot be subject to an implied obligation to purchasers of an undefined and unknown area. He must know both the extent of his burden and the extent of his benefit. Not only must the area be defined, but the obligations to be imposed within that area must be defined. Those obligations need not be identical. For example, there may be houses of a certain

value in one part and houses of a different value in another part. A building scheme is not created by the mere fact that the owner of an estate sells it in lots and takes varying covenants from various purchasers."

In the same case Buckley L.J. at page 323 said:-

"There can be no building scheme unless two conditions are satisfied, namely, first, that defined lands constituting the estate to which the scheme relates shall be identified, and, secondly, that the nature and particulars of the scheme shall be sufficiently disclosed for the purchaser to have been informed that his restrictive covenants are imposed upon him for the benefit of other purchasers of plots within that defined estate with the reciprocal advantage that he shall as against such other purchasers be entitled to the benefit of such restrictive covenants as are in turn to be imposed upon them. Compliance with the first condition identifies the class of persons as between whom reciprocity of obligation is to exist. Compliance with the second discloses the nature of the obligations which are to be mutually enforceable. There must be as between the several purchasers community of interest and reciprocity of obligation."

In *White v. Bijou Mansions Ltd.* [1938] 1 Ch. 351 Greene M.R. 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 interest importing reciprocity of obligation."

The existence of these matters is a question of fact to be determined from the terms of the titles and the relevant circumstances surrounding the sales by the common vendor to the various purchasers.

In the present case the lands sold to Cecil Boswell Facey were described as lots two and three on a plan marked "A" and those sold to Maurice William Facey as lot one on a plan marked "A". While these two Intruments of Transfer can be said to relate to a total defined area the ambit of the plan marked "A" remains unknown. Furthermore two other parcels of land extending respectively to 285¼ acres and one and three quarter acres were transferred on 6th August 1956 by Dunn et al subject to restrictive covenants whose terms are unknown. In these circumstances it is very doubtful whether it could be said that the restrictive covenants in the transfers to the two Faceys were intended to benefit only the lands therein mentioned and none other. However it is not necessary to reach a conclusion on this matter.

In their Lordships' view it is not possible to infer from the facts in this case that either the two Faceys or purchasers from them accepted a liability which could be enforced against them not only by their vendors but by others deriving title from those vendors, and a benefit which they in turn could enforce against others. Apart from the reference to three lot numbers in plan "A" 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 was no evidence as to the circumstances surrounding the 1956 sales, whether, and if so how, they were advertised, what, if any, representations were made by the vendors to the two purchasers, whether or not the latter were each aware of the transaction into which the other was entering. In the absence of any such extraneous evidence the terms of the Instruments of Transfer alone fall far short of what is required to establish community of interest or reciprocity of obligation between purchasers. In *Re Wembley Park Estate Company Limited's Transfer* [1968] Ch. 491 Goff J. at page 503 said that to imply "a building scheme from no more than a common vendor and the existence of common covenants" would be going much too far. Their Lordships agree.

For the foregoing reasons their Lordships will humbly advise Her Majesty that the appeal should be allowed, that the order of the Court of Appeal of 20th January 1987 and the order of Malcolm J. of 14th February 1986 be set aside, that the appellants be entitled to their costs against the respondents before Malcolm J. and that the following declaration be made:-

> "Upon a true construction of the said Instrument of Transfer No. 121687 the nature and extent of the restrictions thereby imposed are personal only and

are only enforceable by the original covenantor and the original coventee BECAUSE:-

(a) the benefit was not expressly annexed to any other lands;

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

(c) the original coventee 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."