[2015] JMSC Civ 219

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2015HCV01740

BETWEEN	**HAROLD MORRISON**	**CLAIMANT**
AND	**FRANK PHIPPS**	**FIRST DEFENDANT**
AND	**PEARL PHIPPS**	**SECOND DEFENDANT**
AND	**KATHRYN PHIPPS**	**THIRD DEFENDANT**
AND	**DAWN SATTERSWAITE**	**FOURTH DEFENDANT**
AND	**RONALD KARL SCOTT**	**FIFTH DEFENDANT**

IN CHAMBERS

Hugh Small QC and Maliaca Wong instructed by Myers Fletcher and Gordon for the claimant

Wentworth Charles instructed by Wentworth Charles & Co for the first and second defendants

Roald Henriques QC and Sidia Smith instructed by Livingston Alexander and Levy for the third defendant

Georgia Buckley instructed by Ballentyne Beswick & Co for the fourth defendant

Pearnel Charles Jnr for the fifth defendant

October 20, 21, 22, 26, 27 and November 10, 2015

INJUNCTION – APPLICATION FOR INJUNCTION – RESTRICTIVE COVENANT – ALLEGATION OF FRAUD – WHETHER COVENANT ANNEXED TO LAND – SECTIONS

SYKES J

[1] Mr Morrison is seeking an injunction restraining Miss Kathryn Phipps, her transferees or her agent from selling, transferring or otherwise dealing with land at volume 1380 folio 664 unless the property is sold, transferred or otherwise disposed of subject to the covenants contained in the consent order of January 7, 2003. He also seeks to restrain Miss Phipps from subdividing or building multi-unit buildings on the property. All this from a man who himself contemplated, at one point, making multi-unit building on his property.

[2] Mr Morrison is claiming that all the defendants were dishonest and rascals because they persuaded or deceived the Registrar of Titles ('ROT') in endorsing covenants on the title that were inconsistent with the court order. The claim is based on fraud. The court has declined to grant the injunctions

[3] In light of some of the submissions made it is vital to set out this court's understanding of the law relating to restrictive covenants and their enforceability in the context of the Torrens system of title by registration.

Restrictive Covenants

[4] Downer JA's judgment in **Half Moon Bay Ltd v Crown Eagle Hotels Ltd** SCCA 48/96 (unreported) (delivered December 10, 1999) is instructive. The decision was affirmed by the Privy Council on other grounds. The Board did not cast

doubt on the chain of reasoning engaged in by his Lordship. The facts were that Half Moon Bay acquired land which it eventually sold to Rose Hall (Developments) Ltd ('Rose Hall'). The instrument of transfer contained the following covenant by Rose Hall with Half Moon:

> *'2. 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 or any part thereof shall for the time being be vested hereby covenants with the vendor [Half Moon] its successors and assigns:*
>
> *(a) Not to erect on the three parcels or any part thereof any buildings 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 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 the Half Moon Hotel (owned by the vendor).'*

[5] The covenants were not entered on the title. The consequence was that Rose Hall took the land free of this encumbrance. Realising what had happened, Half Moon brought a claim against Rose Hall to enforce the covenants. To protect its position Half Moon lodged a caveat against dealing with the land. The Registrar of Titles ('ROT') lodged her own caveat against the lands and made a note which

stated that any future transfer of the land was to be subject to the covenants. This direction was never carried out.

[6] In the proceedings brought by Half Moon a consent order was made which directed that the covenants should be indorsed on the title to the land. The consent order was never complied with. Rose Hall eventually transferred the land to the Urban Development Corporation ('UDC'). This transfer never referred to the covenants. UDC transferred the land to another company and eventually the land was transferred Crown Eagle Hotels Ltd ('Crown Eagle'). Half Moon brought a claim against Crown Eagle 'pursuant to s 5 of the Restrictive Covenants (Discharge and Modification) Act 1960 for a declaration that the Rocamora lands were affected by the covenants contained in the 1966 transfer and that such covenants were enforceable by the appellants' (para 11).

[7] It seems to this court that Downer JA successfully established that within the Torrens system it is indeed possible to have a restrictive covenant endorsed on the title but that covenant is not enforceable between subsequent registered proprietors because the covenant, on a proper construction, was not annexed to the land and therefore was only a personal covenant which would only be enforceable between the original parties to the agreement. In other words the fact that a covenant is endorsed on the registered title does not, without more, make it a restrictive covenant capable of binding subsequent registered proprietors. It all depends on what the covenant says.

[8] How then did Downer JA get to this conclusion? His Lordship relied on the case of **Lamb v Midac Equipment Ltd** PCA 57 of 1997 (unreported) (delivered February 4, 1999), a Privy Council decision from Jamaica. In that case, one FW sub-divided land owned by him into 12 lots. He sold one to MC. Eventually, the lot sold to MC land was owned by Midac. FW also sold land to HL and his wife. Eventually this lot came to be owned by Mr Lamb. When FW sold the land initially, the purchasers entered into a number of covenants with him. In the transfer to MC, the predecessor in title to Midac there were these words.

"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."

[9] The schedule contained a number of restrictions including one to the effect that the land was only to be used for residential purposes. Mr Lamb relied on this provision in his effort to stop Midac from operating its business which was near to his home. It is crucial to note that Mr Lamb was not one of the original parties to the covenant and neither was the benefit expressly assigned to him. According to the Board, in these circumstances, success for Mr Lamb meant that he had to show that the covenant was annexed to the land at the time it was first transferred to MC by FW, the original parties to the covenant. In the world of restrictive covenants, the person who agrees to restrict the use of their land is the covenantor. It is said that the burden of the covenant lies on him. The person to whom the promise is made is called the covenantee. The language is that this person gets the benefit of the covenant or as is sometimes said, the benefit lies with him.

[10] Mr Lamb had to show that covenant was not a personal one between FW and MC. If it was not a personal covenant but was annexed to the land then it was enforceable by him against Midac.

[11] At first instance and in the Court of Appeal, Mr Lamb failed. He was not able to show annexation to the land, neither was he able to show that it was a building scheme and, as already noted, the benefit was not expressly assigned to him. He took his case to the Board. The Board held that there was no building scheme. The Board went on to consider the question of whether the covenant was annexed to the land. To decide this question, the Board had to interpret the covenant.

[12] A digression before continuing with the Board's reasoning. Annexation can only be accomplished by using words effective to nail the covenant (metaphorically) to

the land so that whomever becomes owner is bound by it. Over time, certain time-honoured formulations have been recognised by the courts as being effective to achieve annexation. It is not that any other form of words cannot achieve the objective but all experienced conveyancers know that it is hazardous to depart from words which the courts have found effective to achieve annexation of a restrictive covenant. Not only must the words be sufficient but the terms must either say it is made for the benefit of the land or stated to be made with the covenantee in his capacity as owner of the land.

[13] In examining the covenant, Lord Nicholls took the view that 'reference to heirs, executors, administrators and assigns is consistent with the covenant being intended for the benefit of Frank Watson himself, as distinct from specific property' (para 8). Reliance was placed on the words 'transferees' to negate this conclusion but Lord Nicholls held '[he was] inclined to doubt whether this expression ('transferees'), standing in conjunction with a reference to the covenantee's personal successors but otherwise alone and without elaboration, can be taken to evince an intention to annex the benefit of the covenant to land' (para 9).

[14] It is not very clear from the Privy Council's judgment but the judgment of Court of Appeal makes it plain that the case concerned land registered under the Torrens system and that the covenant in question was endorsed on the respective titles.

[15] The clear position from this case is that the fact that restrictive covenants are endorsed on the title is not decisive of the issue of whether they run with the land and therefore bind subsequent holders of the property.

[16] In the Court of Appeal Carey JA was very plain. His Lordship said at pages 291 – 292:

> *It is necessary to rehearse the conveyancing history as respects the parcel of land owned by that respondent which is represented before us. Frank Merrick Watson, who was*

the registered proprietor of some five acres of land being part of Terra Nova (registered at Vol 480, folio 51), sub-divided the same into twelve lots of land, two of which are relevant to these proceedings and were transferred to Mary C Christie and Hubert A Lowe and his wife, respectively. The respective lots were registered at Vol 477, folio 90, and at Vol 479, folio 78. Mary Christie is the predecessor in title to the respondent, Midac Equipment, the present proprietor There were, I should point out, intervening transfers before the respondent acquired ownership. The appellant, on the other hand, is the registered proprietor of the lot formerly owned by Hubert Lowe and his wife and similarly there were intervening transfers. ***A number of covenants (which it is irrelevant to recite) were indorsed on the respective titles****. The important question will be whether those covenants, whatever their content, were validly annexed to the respective parcels of land. It might not be amiss to remark, however, that similar covenants were indorsed on the respective titles.* ***In order validly to annex the benefit of a covenant to land, apt words must be used, and this is usually done by express words in the instrument creating the covenants. It is true as well to say that annexation is not constituted solely by the use of a prescribed formula, but could be so constituted by intention ascertained from the surrounding facts at the time of the sale****; see Jamaica Mutual Life Assurance Society v Hillsborough Ltd (1989) 38 WIR 192, where the Privy Council held that there were neither apt words in the relevant conveyance nor was there evidence of intention at the time of the sale. (emphasis added)*

[17] This position by both the Court of Appeal and the Board was consistent with the Board's earlier decision in **Jamaica Mutual Life Assurance Society v Hillsborough Ltd** (1989) 38 WIR 192. The land in question was registered land. The appellants bought the land subject to the following covenants:

> *'1. The land above described (hereinafter called "the said land") shall not be sub-divided into lots of less than one acre each;*
>
> *2. No trade or business shall be carried on on the said land or any part thereof.'*

[18] The first two respondents were also registered owners with identical covenants on their title. The third and fourth respondents were registered owners with similar but not identical covenants on their title.

[19] The submissions on behalf of the appellants were that the covenants were personal only because they were not annexed to the land and neither was there evidence of a building scheme. The Court of Appeal disagreed with the first submission and held that it was not necessary to use a prescribed formula to achieve annexation. The Court of Appeal also held that there was a building scheme. The Board did not agree with either conclusion of the Court of Appeal.

[20] The important point for present purposes is the Board's conclusion on the annexation issue. Lord Jauncey stated that '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.' (page 196). Restrictions there were: the restrictions were in the instrument of transfer and on the title but that was not sufficient to annex the covenants to the land. The Board agreed with the appellant's submissions that the words used were insufficient to annex the covenant to the land.

[21] This was the legal context when **Half Moon Bay Ltd** arrived in the Court of Appeal. Downer JA rightly felt that it was quite legitimate to look to see whether

the covenants were annexed to the land. This too was the approach of Langrin J at first instance (33 JLR 103).

[22] Langrin J in his examination of the law stated at page 109 H - I:

> *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 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 may be 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.*
>
> *Equity provides three ways in which the benefit of a covenant may pass. These ways are by annexation, assignment and under a building scheme.*

[23] At page 110 Langrin J expounded further that 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' (emphasis added) (page 110 B).

[24] Langrin J held further, that in light 'of the fundamental importance placed on attachment of the benefit of covenant of 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' (page 110 D).

[25] Langrin J added at page 110E:

> *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 covenants 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.*

[26] Langrin J found that 'the … restrictive covenants were for the benefit of the vendor its successors and assigns' but there '[was] 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' (page 110H). His Lordship added that even if the intention to annex the benefit to some land was clear the court must ascertain the identity of the land to which the covenant is annexed and if annexed the court must also decide whether the annexation was to the whole or part. If the evidence does not meet this standard then annexation fails.

[27] Downer JA was therefore obliged to uphold Langrin J in light of his Lordships precise statement of legal principle and correct interpretation of the covenant in question. Downer JA did not find it necessary to consider the Registration of Title Act since the very words used were incapable of annexing the covenant to the land.

[28] **Half Moon Bay Ltd** took the matter to the Judicial Committee of the Privy Council (2002) 60 WIR 330. Lord Millett gave a brief but pointed judgment. The staccato style evidenced by terse sentences established the following:

a. the Torrens system was introduced in Jamaica in 1889:
b. a person who acquires title in good faith and bona fide gets an indefeasible title '**subject to the incumbrances entered or notified in the Register Book but free from incumbrances not so entered or notified whether he has notice of them or not**' (my emphasis) (para 21);
c. an instrument purporting to affect land only takes effect when produced for registration and provided that it is subsequently entered both on the relevant folium and on the duplicate;
d. the definition of incumbrance in section 3 of the Registration of Title Act ('ROTA') covers 'restrictive covenants which are capable of binding the lands in the hand of a successor in title of the covenantor, but not a personal covenant which is binding on the covenantor only' (para 24);
e. a caveat only prevents registration of a transfer or dealing without the caveator's consent and does not in and of itself 'subject the title of the transferee to the interest or incumbrance which the caveat serves to protect;
f. even if there is a caveat if the registrar mistakenly registers a transfer and does not make the appropriate notification of the caveator's interest, then subject to the registrar's power under section 15 (b) of ROA the transferee takes free from that interest.

[29] Lord Millett took the view that since the interest was not registered then there was no necessity to refer to cases dealing with annexation to land. His Lordship therefore did not find it necessary to review the previous decisions from the Privy Council which was to the effect that even if the covenants are registered they are no of effect if the words of annexation are not adequate to achieve the task unless there was an assignment of the benefit of the covenant or there is a building scheme.

[30] Mr RNA Henriques QC submitted that the consent order has not been interpreted by any court. Therefore it was quite in order for this court to examine the court order and interpret it. Mr Henriques' view was that the consent order itself lacked the necessary words of annexation which meant that the terms of the consent order were not annexed to the land.

[31] In his reply, Mr Hugh Small QC, via written responses, sought to say that Court of Appeal of Jamaica has interpreted the consent order and that the interpretation is binding on the parties. Respectfully, if the Court of Appeal interpreted the order that interpretation would not be binding on this court because the only part of a superior court's decision that is binding on a lower court is the ratio decidendum of the case. The meaning of the consent order was never before the Court of Appeal and neither was a decision on the meaning of the consent order an indispensable step in arriving at the conclusion that the consent order was binding. From reading both judgments in the Supreme Court and the Court of Appeal it is clear that the terms of the order were not before the court. The issue was whether the consent order was binding having regard to the allegation that Mr and Mrs Phipps' attorney at law did not have authority to enter into the consent order. The answer to that question does not require anyone to determine the meaning of the words used.

[32] This court there does not accept the views of the Court of Appeal on the meaning of the order is binding on this court. The views are entitled to respect but they are not binding since they were not necessary for the decision in the case and in any event the issue before the court was not the meaning of the terms of the order. It would be a remarkable thing if any court could on adjudicating on one issue also decide another issue which no one argued, was not before the court and was not a necessary and indispensable step in the chain of reasoning thereby precluding the litigant from arguing the other issue at a subsequent hearing. It follows that this court does not agree with Mr Small that the Court of Appeal gave any binding interpretation of the terms of the consent order.

[33] Mr Small also submitted in reply that Mr and Mrs Phipps cannot seek to impugn the consent order. Respectfully, that is not what is happening here. All that is being said is that the consent order did not run with the land because it did not have the necessary words of annexation.

[34] The plain truth of the matter is that on any reading the consent order does not have any words of annexation. Neither can any necessary inference to be drawn from the words used in the consent order that the parties intended the amendments to run with the land.

[35] The best argument on this point from Mr Small is that the consent order being an amendment to existing covenants that were already endorsed on the title need not have any words of annexation since the words of annexation were present in the unamended covenants and the consent order was to read along with the preamble to the existing covenants. The preamble reads:

> *The restrictive covenants set out hereunder shall run with the land above described (hereinafter called "the said land") and shall bind as well as the registered proprietors their heirs personal representatives and transferees as the registered proprietor and shall enure to the benefit of and be enforceable by the registered proprietors for the time being of the land or any portion thereof now of formerly comprised in Certificate of Title registered at Volume 1020 Folio 618*

[36] The court agrees with Mr Small that this preamble is sufficient for the purposes of annexation to the land. However the stubborn fact is that the terms of the consent order were not placed on the title. Mr Small sought to say that the **Half Moon** case cited by Mr Wentworth Charles is not applicable because there were no allegations of fraud. This court respectfully disagrees. In the Privy Council, the decision in the **Half Moon** case revolved around the fundamental principle that any interest that is unregistered is not binding. The terms of the consent order were not registered and therefore the consequence of this non-registration is as

stated in **Half Moon**. The presence or absence of fraud allegations cannot alter the fact that the terms of the consent order were unregistered at the time of the transfer to Mr Scott. **Half Moon** has reasserted that the state of the register is all important. Where any interest is not registered that may not affect personal liability as between the parties themselves but as between themselves and third parties, the state of the register is vital. Sections 70 and 71 have eliminated the doctrine of notice to such an extent that notice of some interest does not mean that the party who had knowledge of the interest and acted as if it did not exist has committed any fraud.

[37] There is one correction that the court must make. During the delivery of the oral judgment in this matter the court indicated that it agreed with Mr Small that the consent order should be read along with preamble to the covenants that existed at the time of the consent order. The court agreed that in those circumstances it could be argued that the consent order was now part of the covenants as they then stood and therefore the words of annexation in the preamble applied to the consent order. The court was thinking that in those circumstances the terms of the consent order could become annexed to the land. On further reflection this is plainly wrong in the context of registered land under the Torrens system in Jamaica.

[38] These are the reasons for the change in position. On re-reading the Privy Council's advice in **Half Moon Bay** the undisputed position was that the covenants that were in the instrument of transfer but were not endorsed on the title. In the present case there is a court order. Mr Small had submitted that a court order is not an instrument within the meaning of section 3 of the Registration of Titles Act ('ROTA'). Assuming this to be correct, the relentless logic of the judgment is that registration is vital. Thus the Board did not feel it was necessary to decide what the terms of the order were in order to say whether those terms in and of themselves were sufficient to annex them to the land. Lord Millett held at paragraphs 19 and 20:

> ***[19]*** *The judge did not make any relevant findings of fact, but their lordships find it difficult to understand how it could be said that the covenants in question are not capable of benefiting any of the land which forms the site of the Half Moon Hotel. Not only do the Rocamora lands immediately abut on the Half Moon Hotel, but one of the covenants expressly prohibits any beach improvement which is detrimental to the Half Moon Hotel. A covenant in such terms can scarcely be other than beneficial to the Half Moon Hotel.*
>
> ***[20]*** *It is, however, not necessary to develop this question further, because their lordships are satisfied that, even if the covenants are capable of benefiting the Half Moon Hotel, they are unenforceable for want of entry or notification at the relevant time on the certificates of title in the Register Book*.

[39] The fact that something is registrable is not sufficient. It must in fact be registered. The consequence is this even the terms of a court order must be registered on the title. In this case the terms of the court order were not registered.

[40] Lord Millett's view on registration of the instrument was clear in this passage from **Half Moon**. His Lordship said:

> ***[21]*** *The 1889 Act introduced a Torrens system of land registration to Jamaica. The general features of such a system are very familiar. Title to land and incumbrances affecting land are entered or notified in the Register Book, and everyone who acquires title bona fide and in good faith from a registered proprietor obtains an indefeasible title to the land,* ***subject to the incumbrances entered or notified***

in the Register Book but free from incumbrances not so entered or notified whether he has notice of them or not*.*

[22] *The Register Book consists of the original certificates of title, each of which forms a separate folium of the book. The registered proprietor is given a duplicate of the certificate bearing the number of the volume and folium of the Register Book in which the original is entered; s 55 of the 1889 Act. An instrument purporting to affect land is taken to be registered when it is produced for registration, provided that it is subsequently entered both on the relevant folium and on the duplicate; s 58. There are further provisions to ensure that every entry on the original certificate is matched at all times by a like entry on the duplicate.*

[23] *Their lordships can content themselves with referring to the following extracts from the 1889 Act (which are reproduced with emphasis supplied):*

*'**26.** A person registered under this Act as proprietor of any land with an absolute title shall be entitled to hold such land in fee simple, together with all rights, privileges and appurtenances, belonging or appurtenant thereto, subject as follows -*

(a) to the incumbrances (if any) entered on the certificate of title; and

*(b) to such liabilities, rights and interests, as may under the provisions of this Act subsist over land brought under the operation of this Act without being entered on the certificate of title as incumbrances, **but free from all other estates and interests whatsoever** ...'*

*'**70.** Notwithstanding the existence 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** ... '*

*'**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 inquire 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.**'*

*'**88.** ... Upon the registration of the transfer, the estate and interest of the proprietor as set forth in such instrument ... with all rights, powers and privileges thereto belonging or appertaining, shall pass to the transferee; and such transferee shall thereupon become the proprietor thereof,*

and whilst continuing such shall be subject to and liable for all and every the same requirements and liabilities to which he would have been subject and liable if he had been the former proprietor ...'

[24] *The word 'incumbrance' is defined by s 3 to include:*

'all estates, interests, rights, claims and demands, which can or may be had, made or set up, in, to, upon, or in respect of the land adversely and preferentially to the title of the proprietor.'

Thus it extends to restrictive covenants which are capable of binding the land in the hands of a successor in title of the covenantor, but not a personal covenant which is binding on the covenantor only.

(emphasis added)

[41] While it is true that a court order was not the document in question in **Half Moon Bay** there is no escaping the unalterable principle that any interest affecting land must be entered and if not so entered a person who takes the property even with notice of the interest does not by that fact commit fraud. Lord Millett's use of the expression 'bona fide and in good faith' is not an introduction of equity's concept of notice. It was perhaps an unfortunate infelicity but the law is that nothing short of actual dishonesty will do. The ROTA was explicitly designed to eliminate the doctrine of notice. ROTA substituted registration for the doctrine of notice.

The present case

[42] It is helpful to give more details about this case. What I am about to say comes from the affidavits and exhibits filed in this matter. Mr and Mrs Phipps were the registered proprietors of lands at volume 1026 folio 164 and volume 1020 folio

618. The land at volume 1020 folio 618 had a gully running through it which resulted in a larger portion on one side of the gully and a smaller parcel on the other side of the gully. The land at volume 1020 folio 618 had restrictive covenants prohibiting sub-division and restricting the erection any building to private dwellings only. Volume 1020 folio 618 was subdivided. The smaller portion of what was volume 1020 folio 618 became land now registered at volume 1246 folio 932. The larger portion which was still registered at volume 1020 folio 618 was sold to Mr Morrison in 1990.

[43] The consequence of this sub-division was that the land at volume 1246 folio 932, that is to say the smaller portion, became land locked. To remedy this the planning authorities stated that a condition of sub-diving volume 1020 folio 618 was that the smaller portion (i.e. volume 1246 folio 932) was to held with land at volume 1026 folio 164. In addition to this, land at volume 1246 folio 932 had 11 restrictive covenants placed on it. Importantly, land at volume 1026 folio 164 did not have these 11 covenants. Volume 1026 folio 164 had restrictions dealing with storm water. For example the registered proprietor could not prevent storm water from flowing unto the property; drains on the property would not be blocked and finally, any building on the land had to be built 100ft from the centre line of the gully. In essence the covenants on volume 1026 folio 164 related not to building but regulating the flow of storm water to and from the land.

[44] In 2002 Mr and Mrs Phipps applied to modify the covenants on volume 1246 folio 932. Mr Morrison objected. The affidavit in support of the application expressly stated that there was no intention to modify the covenants on volume 1026 folio 164. The matter ended with a consent order entered by Roy Anderson J on January 7, 2003.

[45] The terms of this order were never entered on any of the affected registered titles. Mr Morrison's lawyers, Myers Fletcher and Gordon ('MFG') sent a copy of the consent order to the ROT by letter dated August 28, 2006. What this means is that by August 2006 the ROT not only had knowledge of the existence of the court order but the actual terms of the order. This was a nearly six complete years before the matters alleged to constitute the fraud occurred.

[46] In November 2004, the ROT issued a new title volume 1380 folio 664. This new title combined land previously at volume 1026 folio 164 and volume 1246 folio 932 in one title. These two titles were surrendered to the ROT in January 2004. They were accompanied by a letter, bearing a January 2004 date, from Miss Dawn Satterswaite, attorney at law. The letter pointed out that the holding covenant on volume 1246 folio 932 was incorrectly endorsed as covenant number 1 and concluded by asking that that error be corrected.

[47] By letter dated December 18, 2007 the Senior Deputy ROT wrote to Mr Phipps informing him that the restrictive covenants as endorsed on volume 1380 folio 664 were incorrect because the present endorsement made it appear that the covenants affected the entire land contained in volume 1380 folio 664 but this was not correct because the true position was that only the land that were previously in volume 1246 folio 164 should be bound by the covenants. In other words the 11 covenants mentioned earlier were only applicable to the lot previously registered at volume 1246 folio 164 and not to lands previously registered at volume 1026 folio 164. If there was any doubt about this, the letter expressly said that the land at 1026 folio 164 was 'free from any restriction.' This must mean that other than the covenants relating to storm water there were no other covenants affecting the land. This was indeed an accurate statement in light of the history of the matter related so far. Mr Phipps was also told that if he could recover the duplicate title it would be amended accordingly. The court should also point out that when the Senior Deputy ROT came to this decision there is no evidence that this decision was taken based on any representation alleged to be fraudulent by any of the defendants. What this means is that Mr Morrison is not accusing any of the defendants of misleading the ROT on this point. Indeed counsel for Mr Morrison was very clear that there is no reliance on any conduct before March 2013 to ground the allegation of dishonesty.

[48] The December 27, 2007 registrar's caveat indicated what her position was regarding volume 1380 folio 664. The caveat is lodged with full knowledge of the terms of the consent order. The registrar's caveat stated that covenants noted on volume 1380 folio 664 were deleted in error and should only have been deleted

only in relation to land previously at volume 1020 folio 618. The caveat was said to be in place until that error was corrected. In other words even after the November 2007 meeting the ROT did not endorse the terms of the consent order on the title even though by then she had received a copy of the order over a year earlier, had received numerous letters from MFG complaining about the lack endorsement of the terms of the consent order on the title. It seems to this court that when the ROT issued her caveat it cannot be contended that she was not aware of MFG's concerns about the lack of endorsement of the terms of the consent order on the title.

[49] By end of January there was one registrar's caveat. It said that the restrictive covenants only applied to land previously registered at volume 1246 folio 932. Upto this point the terms of the consent order were not endorsed on the title. This means that MFG, regardless of what was said during the November 6, 2007, were told that registrar had issued a caveat and they were also told the reason for issuing the caveat. MFG also received a copy of the caveat.

[50] MFG wrote a number of letters between August 2006 and October 2007 raising questions about the consent order. What these letters show is that regardless of who the incumbent ROT was he or she would have received communication telling of the existence of the consent order. The constant letter writing eventually produced a reaction from the ROT. It was agreed that MFG and the Snr Deputy ROT would meet on November 6, 2007. They met. There is no evidence of the content of the conversation but it is unimaginable that the consent order of January 2003 not would have arisen since there was constant reference to it in the letters from Mr Morrison's lawyers. This meeting took place over a year after the court order was sent to the ROT by MFG in August 2006. The consequence is that when the meeting took place the ROT was fully aware of the existence and terms of the consent order. As already stated it was after this meeting that the two registrar's caveat were lodged and neither mentioned anything about the January 7, 2003 consent order even though the ROT had a copy of it and as well shall below, a Deputy ROT wrote a letter in February 2008 acknowledging that

the ROT had received a copy of the consent order in April 2007, that is to say, a full seven months before the Snr Deputy ROT met with MFG.

[51] There are two letters which must be mentioned here. One is from Miss Dawn Satterswaite stated February 1, 2007 and another from the Deputy ROT dated February 22, 2008. This letter refers to Miss Satterswaite's letter dated February 1, 2007. However the date on Miss Satterswaite's letter must be an error. This is so because it refers to an affidavit of Mr Morrison with the registrar's caveat. From the other material in the case there was only one registrar's caveat and that one was lodged December 27, 2007.

[52] Miss Satterswaite brought to the attention of the ROT the mixed signals coming from the ROT. According to Miss Satterswaite, the registrar's caveat suggested that the covenants were deleted only in so far as they related to land formerly registered at volume 1020 folio 618 but, says Miss Satterswaite, this is contrary to the letter from a Mr Miller dated December 18, 2008. Miss Satterswaite asked that the confusion be resolved.

[53] The February 22, 2008 letter was from Mr Miller the Deputy ROT. It was a letter addressed to Miss Satterswaite. It is better to set out the relevant paragraphs in full:

> *On perusal of the covenants as endorsed on the Certificate of Title registered at Volume 1246 Folio 932, you will observe that these are covenants carried forward to Certificate of Title registered at Volume 1380 Folio 664. The encumbrance at Volume 1026 Folio 164 are conditions of subdivision approval by the Local Planning Authority.*
>
> *The confusion which seems to have arisen rises (sic) from a Court Order in Suit NO ERC 10 of 2002 dated January 7, 2003 between the applicants and the objector extracted by*

> *Messrs Clough Long & Co and brought to our attention by Messrs Myers Fletcher and Gordon on April 30, 2007. Had you advised us of this Order, the cause of confusion would not have arisen.*
>
> ***Restrictive Covenants are not registered under the Registration of Title Act and therefore, the endorsement on the Certificate of Title does not have the force of law. It is note (sic) of an agreement between the parties as to the user of the land and there is no doubt that the order of the Court by the consent of the parties is binding as the owners of the land.***
>
> ***You should now return to us the duplicate Certificate of Title registered at Volume 1380 Folio 664 to have the endorsements re-instated and as the same time forward the consent order to be entered in the Certificate of Title*** *(emphasis added).*

[54] This letter is speaking to why the confusion occurred. It states that the court order was brought to the attention of the ROT on April 30, 2007. That is inaccurate because there is a letter from MFG to the ROT dated August 28, 2006 stating that the order was enclosed with the letter.

[55] The April 30, 2007 letter referred to by Mr Millers is a letter from MFG to the National Land Agency (of which the ROT is a part) referring to 'our letter dated August 28, 2006 addressed to you attaching consent order.' The letter has other things that are not relevant. From this the ROT had knowledge of the consent order from August 28, 2006 and were reminded again on April 30, 2007.

[56] Between March 2008 and January 29, 2010 there was litigation over the validity (not the meaning of its terms) of the consent order which ended in Mr Morrison's favour: the validity was upheld. Even after this the ROT did not endorse the terms of the consent order on the title. The documentation reveals that in a letter

dated July 25, 2008 (nearly two years after the consent order was sent to the ROT), MFG wrote to the ROT telling her of outcome of the litigation about the consent order in the Supreme Court since the matter had not yet reached the Court of Appeal. The letter specifically asked that '[i]n light of the foregoing, we now request that the restrictive covenant previously deleted from certificate of title registered at volume 1380 folio 664 (previously certificate of title registered at volume 1026 folio 164 and volume 1246 folio 932) be restored.'

[57] Mr Miller is also saying that Miss Satterswaite should forward the consent order so that it can be entered on the certificate of title. One wonders why he would need the consent order from Miss Satterswaite when by his own letter he already had it and this was after the meeting between MFG and the Senior Deputy ROT on November 6, 2007. In other words, if the ROT intended to act on the consent order she had all that she needed to act. She had the order itself.

[58] Let us be clear. Volume 1246 folio 932 had 11 covenants on it relating to what could be built on that parcel. Volume 1024 folio 164 had covenants related only to storm water. These two parcels were combined in one and a new title volume 1380 folio 664 was issued. Apparently, the 11 covenants that were on volume 1246 folio 932 were added to the new title volume 1380 folio 664 in such a manner so as to give the impression that the entire parcel in the new title was to be subject to the 11 covenants when it was only intended that despite the new title only that portion that was subject to the 11 covenants should continue be subject to those 11 covenants. It seems that when this error was discovered there was a correction and the correction resulted in another error, namely, a removal of all the restrictive covenants from volume 1380 folio 664. It is important to note that in all this there is no correspondence exhibited before this court indicating that the ROT in her caveat ever mentioned the consent order which to her certain knowledge existed and was in her office.

[59] In March 2015 MFG wrote to the ROT yet again raising the issue of the endorsement of the terms of the consent order on the title. By the time of this letter there were a number of important developments. Before going to these important developments there was a second letter in March 2015 from MFG.

That letter stated that they met with the ROT on March 17, 2015. Apparently, MFG were told of the removal of the registrar's caveat and the new endorsements on volume 1380 folio 664. The ROT was told that what was endorsed on the title was different from the consent order. It is this endorsement without the consent order amendments that is said to be the product of dishonesty on the part of the defendants.

[60] Now to the events between 2010 and 2015. By letter dated March 26, 2013 Miss Dawn Satterwaite sent volume 1380 folio 664 for endorsements to be made as discussed at a meeting between the ROT and Mr Dabdoub, Mr Raymond Clough, Miss Kathryn Phipps, Miss Nicola Murray and Miss Satterswaite. The March 26 2013 letter stated that the endorsements to be made were to be as discussed in the meeting (which took place on March 22, 2013) and as stated in the ROT's letters of January 13, 2004 and December 18, 2007.

[61] It will be recalled that the December 18, 2007 letter was addressed to Mr Phipps and it told him that the endorsement on volume 1380 folio 664 were incorrect because it gave the impression that it applied to the entire land but should only have applied to land previously registered at volume 1246 folio 932. The January 13, 2004 letter was not placed before this court. It may well have been in response to Miss Satterswaite's letter of January 5, 2004 where it was pointed out to the ROT that there was some error on volume 1246 folio 932.

[62] There is an email from the ROT April 3, 2013 to Miss Satterswaite in which the ROT is saying that a draft of what was to be endorsed on volume 1380 folio 664 was sent to Miss Satterswaite. The ROT stated that the amendment was to reflect the documents presented to the ROT when volume 1380 folio 664 was issued. It also said that volume 1246 folio 932 would not be returned to Miss Satterswaite because it should have been canceled in 2004 since the land that was once there was now in volume 1380 folio 664. The ROT also said that if the consent order was to be pursued an attested copy should be lodged with the ROT for the amendments to be made.

[63] At this point in the narrative it should be clear that by 2013 the ROT, whether in the person of the incumbent at the time or not, had been inundated with letters

from MFG about this consent order. There was even a meeting on November 6, 2007 with the Senior Deputy ROT. The point is that there can be no doubt that by 2013 the ROT was fully aware of the consent order.

[64] Miss Satterswaite replied to the ROT on April 19, 2013. Miss Satterswaite said that the file in the Supreme Court was lost, MFG have also lost their file and so it was not possible to get a certified copy. This might not be entirely accurate since there is nothing to suggest that MFG was unable to find its own copy of the consent order. Miss Satterswaite told the ROT that a copy of the consent order was sent to the ROT when volume 1380 folio 664 was issued.

[65] The draft that was sent back and forth between the ROT and Miss Satterwaite and what was eventually endorsed on volume 1380 folio 664 captured 10 of the 11 covenants that were on volume 1246 folio 932. The draft and endorsement said that the restrictive covenants on volume 1380 folio 664 shall only concern land previously registered at volume 1246 folio 932. This is consistent with the ROT's position outlined in her letter of December 18, 2007 where she said that the land that was volume 1026 folio 164 was now part of volume 1380 folio 664 was not to be burdened with the restrictive covenants on volume 1246 folio 932.

[66] Miss Satterswaite's email communication with the ROT in April/May 2013 was consistent with the ROT's own position stated in December 2007. There is no evidence of the content of the meeting with the ROT and Mr Dabdoub and others on March 22, 2013 other than what Miss Phipps says. According to Miss Phipps, Mr Dabdoub took the view that land was not bound by the consent order.

[67] The ROT sent a letter dated June 5, 2013 in which she returned the amended duplicate title volume 1380 folio 664. The registrar's caveat was removed on June 7, 2013. In July 2013 volume 1380 folio 664 was transferred to Mr Ronald Scott, an uncle of Miss Phipps. The consent order was not endorsed on the title before this transfer which means that Mr Scott took free and clear of the consent order. Eventually he executed a 'love and affection' transfer of volume 1380 folio 664 to Miss Phipps in 2014. She is now the registered proprietor. This transfer was said to be the product of dishonesty or part of scheme to defeat the consent order of January 7, 2003.

[68] In 2014 there were letters between the ROT and Mr Phipps confirming that the consent order would not be binding on subsequent transferees.

What amounts to dishonesty

[69] It was said that the transactions in this case amount to fraud because of the absence of good faith. This proposition ignores the Court of Appeal's decision in **Harley Corporation Guarantee Investment Company Ltd v Estate Rudolph Daley** [2010] JMCA Civ 46. In that case the principal of Harley visited a plot of land that was advertised for sale by the mortgagee. It was advertised as a lot with a half-finished house. He need not have gone to visit the land but he did. When he got there he saw a fully completed house together with occupants. He actually spoke with one of the occupants. The occupant's response to his question made it clear that the occupant was claiming an interest in the property. He therefore knew that (a) the property was not unoccupied; (b) it was not a half-finished house and (c) someone was claiming an interest in the property. He went to the mortgagee, did not disclose what he now knew and bought the property at the undervalued price. The trial judge (Sykes J) held that his conduct with the knowledge he actually had amounted to fraud. The Court of Appeal reversed this finding (see paragraphs 47 – 67). The Court of Appeal expressly stated that the trial judge was oblivious to the fact that the purchaser was under no obligation to make enquiries. At paragraph 60 the Court of Appeal set out the findings made by the trial judge on the question of fraud. Indeed the trial judge relied on the principle of willful blindness as amounting to fraud. It was also said that even if the principal of Harley knew of the increased value but did not disclose it to the mortgagee that could not possibly amount to fraud. The Court of Appeal is saying that even if the now registered proprietor makes inquiries that he is not obliged to make and his inquiries reveal facts to him that would make him realise that his previous information about the land was incorrect and he actually found out that someone was indeed claiming an interest in the land and he purchases with that knowledge that does not amount to dishonesty. This is a very strict application of the principle that knowledge of the existence of a prior

interest without more cannot amount to dishonesty. It is a very strict application of the principle that interests, where permissible, must be registered on the title and failing that a subsequent registered proprietor is not bound by knowledge of that interest's existence.

[70] The point is that this present case, on the present pleadings, is far inferior to the evidence in **Harley Corporation**. If what happened in **Harley Corporation** did not amount to fraud then clearly this present case as presently pleaded is unlikely to succeed. It may well be that what happened in **Harley Corporation** may well be said to be a lack of good faith but what is clear is that what he did did not amount to dishonesty. Every act of dishonesty must necessarily be also a lack of good faith but it appears that not every act of lack of good faith amounts to dishonesty for the purpose of ROTA.

[71] Therefore when the Privy Council **Half Moon** said that under the Torrens system 'everyone who acquires title bona fide and in good faith from a registered proprietor obtains an indefeasible title' their Lordships were simply saying that unless there is actual dishonesty on the part of the new registered proprietor his title cannot be impeached. It would seem to this court that the bona fide and good faith in the context of the ROTA really means absence of actual dishonesty on the part of the registered proprietor. The fact that prior to registration the proprietor knew of some other interest that is registrable but unregistered and he proceeded with the transaction with that knowledge does not mean that he is dishonest.

[72] Mr Small has cited the case of **Waimiha Sawmilling Company Ltd (in Liquidation) v Waione Timber** [1926] AC 101. In particular this passage was cited from the advice of Lord Buckmaster at pages 106 – 107:

> *If the designed object of a transfer be to cheat a man of a known existing right, that is fraudulent, and so also fraud may be established by a deliberate and dishonest trick causing an interest not to be registered and thus fraudulently keeping the register clear. It is not, however, necessary or*

> *wise to give abstract illustrations of what may constitute fraud in hypothetical conditions, for each case must depend upon its own circumstances.*

[73] All this is true but the next sentence is critical too which reads.

> *The act must be dishonest, and dishonesty must not be assumed solely by reason of knowledge of an unregistered interest.*

[74] This court finds it difficult to accept that ROT was tricked by the defendants into not recording the consent order when the clear evidence is that she knew of both the existence of the order and the content of the order from at least August 2006. She received another copy of the order in April 2007. She received a copy of the first instance judgment in 2008. Thus there was no doubt that the order existed. Based on the evidence presented to this court the ROT's caveat and letters did not evince any intention of registering the consent order. The court is not saying and is making no pronouncement on whether the non-registration was lawful or not. What the court is being careful to say is that the ROT did not indicated that it would be registered. Not even the meeting with MFG on November 6, 2007 showed any change of position on the part of the ROT. If this is correct, where is the trick or deception amounting to dishonesty? If the ROT was not tricked then the inevitable conclusion would have to be that the ROT was part and parcel of the fraud. However, let this court hasten to add that the defendants have expressly stated that the ROT is not being accused of fraud. At one point the ROT was a defendant but the claim was discontinued against her. This position means that the defendants must allege that the ROT was tricked but as this court has concluded, based on the material presented, the material is very, very weak on this question of a trick. On the pleaded case along with the documents exhibited to the affidavits it is asking too much of this court to conclude that there is a case of fraud sufficient to justify the grant of an injunction.

The case against Mr and Mrs Phipps

[75] Mr Wentworth Charles submitted that there is no serious issue to be tried because the allegations of fraud against the Mr and Mrs Phipps are vague. They stand accused of executing a sham transfer to Mr Scott at an undervalue. It is said that the transfer was for JA$5m and after Miss Phipps became the registered proprietor she advertised the land for JA$192m. It is also said that Mr and Mrs Phipps executed a transfer to Mr Scott knowing that they had no bona fide interest in passing the title to Mr Scott. Mr and Mrs Phipps stand accused of passing the title to Mr Scott as part of a plan to defeat the consent order. It was also said that the letters of April 9, May 6 and July 9, 2014 were designed to influence the ROT to delete the registrar's caveat and endorse covenants which materially differed from the consent order. Finally, they instructed Miss Satterswaite to deliver title at volume 1380 folio 664 to ROT in order to facilitate the sham transaction.

[76] It was pointed out during the submissions that there was no restriction on Mr and Mrs Phipps selling the land. The restrictive covenants that existed dealt with the type and number of building that may be erected on the land. Thus the sale of land in and of itself cannot be fraud.

[77] It is this court's view that the allegations of fraud are not just vague, they are virtually non-existent. The court will begin with allegation of a sale at an undervalue. Mr Charles cited the case of **Midland Bank Trust Co Ltd v Green** [1981] 1 All ER 153. In that case a father owned a valuable form. He granted his son an option to purchase at £75/acre. The option was to last ten years. It was not registered. Six years later the father transferred the land to his wife for £500 despite the fact that it was worth £40,000.00. The son was never told about the transfer and only found out when he decided to exercise his option. The son sued the father and his mother's estate since she had died after the transfer to her. The trial judge found against the son. The Court of Appeal reversed the trial judge on the ground that the mother's consideration for the property was inadequate and a sham. The executor of mother's estate appealed. The House of Lords reversed the Court of Appeal. It is true that their Lordships were

concerned with a statutory provision. However, the court cautioned against simply looking at a transaction and deciding that because it was at an undervalue then it necessarily means that something nefarious occurred.

[78] From the narrative of the facts given earlier in these reasons for judgment it is plain as can be that the ROT did not endorse the consent order on the title. Indeed between the time of the consent order in 2003 and 2013 when the transfer to Mr Scott was done despite the letter writing of MFG and meetings with MFG the consent order was not endorsed on the title. There is absolutely nothing done by Mr and Mrs Phipps that prevented the ROT from acting on the consent order. The court is not blaming the ROT or insinuating that she acted improperly. What the court is saying is that Mr and Mrs Phipps had nothing to do with the non-endorsement on the title of the consent order. Mr Morrison has expressly stated through his counsel that they are not relying on anything done before March 2013 to ground the fraud. Put another way the ROT's non-registration the terms of the consent order was not the result of dishonesty on the part of anyone.

[79] Mr Morrison hangs his case on the March 22, 2013 meeting and what happened thereafter. He claims that the vice of Mr and Mrs Phipps was to authorise their counsel Miss Satterswaite to advance amendments that were to be endorsed on the title which was contrary to the consent order. These incorrect amendments were known to Mr and Mrs Phipps and were done in order to defeat the effect of the consent order. The problem for Mr Morrison here is that what was endorsed was exactly what the ROT indicated she would be doing from December 2007 when she lodged her own caveat. Thus if what she did in 2013 was what she intended to do from 2007 and if it was not dishonest in 2007 how can it be dishonest in 2013 when there is virtually no evidence (yet) of the ROT being tricked or deceived?

[80] The problem here is that the ROT knew of the consent order and knew of its terms. She got it in August 2006 and again in April 2007. It is impossible to suggest that she was misled because one cannot be misled that something does not exist when to one's certain known it exists. The only explanation is that the ROT decided not to register the terms of the consent order. Even when it is said

that Miss Satterswaite incorrectly said that copies were not available the undeniable fact is that the ROT had already received at least two copies of the order. Not only that, she was sent copies of judgment of Beswick J by MFG.

[81] It is a bit strange to accuse a lawful owner of property of transferring it for no bona fide reason. The lawful owner of property is under no obligation to have any reason at all for disposing of his property as he sees fit. He can give it away or sell it for a cent if that is his desire.

[82] The allegation that the ROT was induced to remove her own caveat is contrary to the letters seen by this court. The incontrovertible fact is that the ROT in December 2007 made the decision to lodge her own caveat against volume 1380 folio 664. In her reasons given in the caveat the ROT never referred to the consent order as the basis of the caveat even after the meeting with MFG as well as certain knowledge of the contents of the consent order. If there was any doubt about the thought processes of the ROT it was removed by a letter dated February 22, 2008 from the Deputy ROT. The content of this letter has already been stated.

[83] Miss Wong sought to say that the ROT erred in removing the caveat and her decision to do so was based on representation made to her at the meeting with Mr Dabdoub and others on March 22, 2013. That is only part of the story. The ROT had the order, met with MFG, had all the letters from MFG and yet did not endorse the consent order on the title. The two things relied on to support the allegation of a sham transaction are (a) the alleged undervalue of JA$5m paid by Mr Scott and (b) Mr and Mrs Phipps had no bona fide interest in passing title to Mr Scott. These allegations are not sufficient to enable this court to say that the injunction ought to be granted against Miss Phipps on the premise that she was part of a conspiracy to defeat Mr Morrison's interest. Even if Mr and Mrs Phipps had told Mr Scott about the consent order Mr Scott was under no legal obligation to do anything more than examine the state of the register and once the terms of the consent order were not registered he is not bound by them.

[84] No injunction was sought against Mr and Mrs Phipps but this analysis was necessary because the case theory of the Mr Morrison is that the root of this

alleged fraud against him was the desire of Mr and Mrs Phipps to avoid the consent order by illegal means.

The case against Miss Kathryn Phipps

[85] The case of fraud against Miss Phipps is that she attended upon the ROT with Mr Dabdoub and others with the intention to influence her to endorse on the title restrictive covenants which resembled the consent order but with the limitation that they should only apply to the land at volume 1246 folio 932. It is also said that at the time of the endorsement on volume 1380 folio 664 Miss Phipps knew that endorsements sought were incorrect and in breach of the consent order.

[86] It is alleged that her fraud was accepting a sham transfer to herself from Mr Scott with the intention of defeating the consent order.

[87] It is also said that Miss Phipps caused or allowed the sham transaction as part of colourable device to alienate the title in order to defeat the consent order. Finally, she accepted the transfer and was seeking to sell the property for JA$192m to a third party when the title did not reflect what was mutually agreed.

[88] What has been said above in relation to Mr and Mrs Phipps applies here and need not be repeated.

[89] It was Mr Scott who made the transfer to Miss Phipps. By the time the land was transferred to her, the consent order was already defeated because it was never endorsed on the title prior to the transfer to Mr Scott. Understandably Mr Small sought to say that **Half Moon** did not apply. The injunction sought against her is refused. The pleaded case of fraud is anaemic.

The case against Miss Dawn Satterswaite

[90] The essence of the case of fraud against Miss Satterswaite is that she was the agent of Mr and Mrs Phipps and she was the one who communicated with the ROT in 2013 and sent the drafts to the ROT to be endorsed on the title. It is said that she participated in having incorrect endorsements placed on volume 1380 folio 664.

[91] Again the narrative of fact and analysis already done applies here and will not be repeated. It is not easy to see the fraud as alleged by Mr Morrison when the correspondence exhibited in this case is examined.

The case against Mr Ronald Scott

[92] The allegation of fraud is that he allowed or facilitated the sham transaction to himself and then to Miss Phipps. It is alleged that he signed the transfers with a consideration knowing it to be false. He is accused of accepting the sham transfers knowing that no interest was intended to pass to him.

[93] Having regard to what was said about **Harley Corporation** above the pleaded case against Mr Scott has no prospect of success. He took free and clear of the consent order. Mr Scott was free to dispose of the land in any way he saw fit. The fact that he transferred it to Miss Phipps for 'love and affection' cannot defeat the clear law in **Harley Corporation**.

Whether injunction should be granted

[94] The leading case on injunctions is now **National Commercial Bank v Olint** [2009] 1 WLR 1405; [2009] UKPC 16. In that case Olint sought and was refused at first instance but was granted on appeal, an injunction preventing the bank from closing its accounts. The bank successfully appealed to the Privy Council. The facts were that Olint had several accounts with the bank who had begun to hear rumours that Olint was, in reality, a Ponzi scheme where by previous investors were paid out of the sums paid in by new investors. The bank fearing that it might become the subject of law suits gave notice that it would close the accounts. Olint asked for an extension which was granted. Just before the time for closing the accounts expired, Olint applied for an injunction.

[95] Olint alleged several causes of action against the bank. None of which, in the view of the Board, was promising. The Board reversed the Court of Appeal. At paragraph 21 the Board listed a number of factors that should be taken into account in the context of that particular case. Of the five factors listed, three are unique to that case but two are of universal application: whether the claimant

would be able to satisfy the undertaking as to damages and whether the claimant's case 'even if not hopeless … certainly very weak.' The one applicable here is the latter.

[96] The claim in this case is practically unsustainable. To repeat, section 71 of ROTA provides:

> *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 … 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*

[97] This provision abolishes the doctrine of notice that plagued common law conveyancing. Using the names of the parties in this case and the principles from the decided cases the provision could be rewritten as follows:

> *Unless it established that Mr Ronald Scott was actually dishonest, Mr Scott when contracting with Mr and Mrs Phipps or dealing with Mr and Mrs Phipps or proposing to take a transfer from Mr and Mrs Phipps of land registered at volume 1380 folio 664 shall not be required or in any manner concerned to enquire or ascertain the circumstances under, or the consideration for, which Mr and Mrs Phipps or any previous proprietor thereof was registered, or to see to the*

application of any purchase or consideration money, or shall be affected by knowledge, actual or constructive of any trust or unregistered restrictive covenant, notwithstanding the existence of any common law or equitable rule of law to the contrary and the fact that Mr Scott knew of the unregistered restrictive covenants in the consent order shall not of itself mean that Mr Scott is dishonest.

[98] If Mr Scott by law is not required to examine how, when, why or for what purpose Mr and Mrs Phipps acquired the property and why they wish to sell it to him how can it be said that by some unexplained process of reasoning that the sum paid by him or allegedly paid by him was inadequate or worse that transferring the land for love and affection is wrong?

Conclusion

[99] Mr Morrison discontinued his claim against the ROT. This meant that he was not alleging that she was dishonest. The consequence was that he had to make a case of conspiracy against the remaining five defendants and present the ROT as being duped by them. The problem with this case theory is that the documents going back to 2007 shows the thought processes of the ROT and there is nothing to show that she was deceived. Her position on the consent order has been consistent: she did nothing about it. Nothing happened in 2013 that showed a change in the thinking of the ROT and therefore if her position was the same for six years at least, then there must be something more to show that she was tricked. Thus when Miss Satterswaite responded to the ROT's draft in April/May 2013, the ROT already had knowledge of the existence and content of the consent order.

[100] This court agrees with Mr Henriques' submission that by all appearances the ROT made her own independent decisions and was not tricked or mislead by anyone. This is really a submission on causation. If the effective cause of non-registration of the restrictive covenants was the ROT's independent decision then

Mr Morrison's case has no foundation because any fraud practiced would not have been the case of the non-registration of the terms of the consent order which means he would not have suffered any loss from the alleged fraud.

[101] The problem for Mr Morrison is that he really does not know why the terms of the consent order was entered on the title and is seeking to attribute this to March 22, 2013 meeting between the ROT and Mr Dabdoub and others.

[102] The court heeded Mr Small's reminder that the court is not to conduct a mini-trial. The affidavit evidence does not conflict on the core facts.

[103] The court agrees with Mr Wentworth Charles' submission made on behalf of Mr and Mrs Phipps that disposing of land with knowledge of the existence of some unregistered interest in the land without more does not amount to fraud. There must be actual dishonesty.

[104] Miss Georgia Buckley, for Miss Satterswaite emphasised that there is nothing to show that ROT did not know of the consent order. The court agrees. The numerous letters from MFG made sure that she did not forget the consent order. The letter from the Deputy ROT showed that she received the consent order. The ROT was even sent a copy of Beswick J's judgment and the consent order is set out there. Miss Buckley also highlighted that Mr Morrison's prospect of securing a permanent injunction is not very high. It is difficult to disagree with this submission.

[105] Mr Pearnel Charles Jnr, on behalf of Mr Scott, submitted strongly that the adequacy or otherwise of consideration is not a matter for the court. He too relied on the **Midland Bank** case. He also relied on **Boyd v Mayor of Wellington** [1924] NZLR 1174 which decided that once a person without fraud on his part became a registered proprietor of land he acquired an indefeasible title even if the documents that made him the registered proprietor had no legal effect. The reason for this is that the statute does not register a title; it confers title upon registration. As long as the registered proprietor was not dishonest it does not matter how he became the registered proprietor.

Disposal

[106] The application for injunction is dismissed.