

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

SUIT NO. E.209 OF 1983

IN THE MATTER of ALL THAT parcel of land
part of CONSTANT SPRING ESTATE situate
in the Parish of SAINT ANDREW of the
shape and dimensions and butting as
appears by the Plan thereof and being
the land comprised in Certificate of
Title registered at Volume 1161 Folio 246
of the Register Book of Titles

A N D

IN THE MATTER of Section 5 of the
Restrictive Covenants (Discharge and
Modification) Act.

BETWEEN	THE JAMAICA MUTUAL LIFE ASSURANCE SOCIETY	APPLICANTS
A N D	ROBERT BOLT	1ST OBJECTOR/RESPONDENT
A N D	ROYAL BANK TRUST CO. LTD.	2ND OBJECTOR/RESPONDENT
A N D	HILLSBOROUGH LIMITED	3RD OBJECTOR/RESPONDENT

Emil George Q.C. and B. St. Michael Hylton instructed by Myers Fletcher
and Gordon, Manton and Hart for the Applicants.

Dr. Lloyd Barnett and Dennis Morrison instructed by L. Eatmon of Dunn
Cox and Orrett and Miss Hilary Phillips of Perkins, Tomlinson, Grant
Stewart and Company for First and Second Objector/Respondents.

Donald Scharschmidt instructed by John Ross for Third Objector/Respondent.

ORAL JUDGMENT

February 14, 1986.

MALCOLM, J:

This action was heard on the 7th, 8th and 9th days of May and
on the 22nd and 23rd days of October, 1984, on which last date I reserved
judgment herein. I apologise to all concerned for the delay in handing
down my decision in the matter but this was due to extreme pressure of
work.

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In proceedings begun by notice of motion dated the 29th day of October, 1983, the applicant, Jamaica Mutual Life Assurance Society, moved the court to declare:

- " A. Whether all that 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;
- 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."

The motion was supported by affidavits deponed by Patricia Taylor who described herself as the Assistant Vice President and Secretary of the Applicant Society and by Frederick Theophilus Williamson who stated that he was associated with the firm of Myers, Fletcher and Gordon, Manton and Hart as advisor in matters relating to the Office of the Registrar of Titles including the tracing of roots of titles.

The first affidavit, that of Patricia Taylor stated, inter alia, that:

" The society is the registered proprietor of an estate in fee simple in all that parcel of land part of Constant Spring Estate in the parish of Saint Andrew now known as number 13a Norbrook Road and being the land comprised in Certificate of Title registered at Volume 1161 Folio 246 of the Register Book of Titles(hereinafter called the said land.)"

Paragraph 3 of that affidavit reads that:

" The Certificate of Title for the said land has certain restrictions endorsed thereon".

and specific reference is made to restrictions number 1, 2 and 8.

" (1) The land above described (hereinafter called 'the said land') shall not be subdivided into lots of less than one acre each",

- " (2) that no trade or business shall be carried on on the said land or any part thereof."
- " (8) the existing gullies passing through the said land shall not be built on or blocked in any way."

Paragraph 5 reads that:

" The society wishes to develop the said land and to construct thereon thirty (30) Town Houses and twenty-four (24) Apartments with the remaining land to be used as common areas for recreation."

The affidavit referred to previous proceedings for the modification of certain of the said restrictive covenants and gave a short history of these proceedings in which objections were filled by:

- (a) Hillsborough Limited, the registered proprietor of 15a Norbrook Road, Kingston 8 registered at Volume 1154 Folio 783 of the Register Book of Titles; and
- (b) Robert Bolt, the registered proprietor of 15 Norbrook Road, Kingston 8, registered at Volume 1069 Folio 108 of the Register Book of Titles; and
- (c) Royal Bank Trust Company Limited, registered proprietor of 32 Norbrook Road, Kingston 8 registered at Volume 1112 Folios 142 and 143 of the Register Book of Titles.

The same objectors incidentally are the ones in this matter before me.

The affidavit of Frederick Williamson, already mentioned, traced among other things, the history of the land owned by the objectors and also the applicant's premises entered at Volume 1161 Folio 246 and the affidavit closed (and here I refer to paragraph 11) as follows:
"I verily believe that the restrictions endorsed on the title for the applicant's premises were not properly imposed."

Mr. George for the applicant argued that there must at all times be a dominant and servient tenement and the owner of the dominant tenement would sometimes bind not only the land sold but the land retained. He conceded that restrictions were at all time imposed on Retreat, but it was clear that they did not apply to land at Norbrook or Constant Spring Estate. He further submitted that the covenants sought to be enforced were personal to the original owners and transferors

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of land at Volume 89 Folio 45; there was no intention, he said, that the covenants should run with the land. He argued that there are three ways in which a person not being an original covenantee could become entitled to the benefit of a restrictive covenant; first he may be an assignee of the land to which the benefit of the covenant had been annexed either expressly or by necessary implication; secondly, he might be an express assignee of the benefit of the covenant; or thirdly, both he and the opposing party may be interested in land within an area subject to a Scheme of reciprocal rights or obligation.

It was his contention that in this case, firstly, there was no annexation either express or implied; secondly, there was no express assignment and thirdly, there was no Scheme.

On the subject of a Scheme, Mr. George submitted that one would have to be more than inventive and ingenious to eke out a scheme from all this. Mr. George frequently referred to Preston and Newsom's work "Restrictive Covenants affecting Freehold Land". On "Scheme of Development" he cited among others, the following cases: Renals v. Cowls Shaw (1879) 2 Chancery Division, P.866; Reid v. Bickerstaff (1909) 2 Chancery Division, P.305 and White v. Bijou Mansions Limited (1938) 1 Chancery Division, P.351. He submitted that no possible scheme could exist in this case.

Dr. Barnett gave an outline of what he considered Mr. George's case to be. Dr. Barnett said the objectors or respondents as he chose to call them, challenged the applicant on all points that Mr. George had outlined. He said that the respondents would submit that the factual position is:

- (1) The history of the matter shows that the property in question was one tract of land comprised in Certificate of Title;
- (2) That there was a clear policy on the part of the original owners to establish a regime of controlled development in the area concerned and covered by their estate, aimed at preventing fragmentation of the land in what they considered to be undesirably small parcels and also to preserve the residential character of the area.

The transfers of parcel of land from the main title created covenants devised to achieve those aims and were endorsed on the Certificate of Title as encumbrances on the land. It was unnecessary in those circumstances to emphasise by explicit terms that the land retained would be developed for use in accordance with those aims and the restraint imposed on strangers, but they did, in fact, indicate that the benefit was for the retained land as well as for transferred land and that the land retained was similarly encumbered.

Both the sections of land described as 'Retreat' and described as 'Norbrook', were burdened with covenants in accordance with these aims and were given the benefit of these covenants. Further, the covenants which were created were at all stages endorsed on Certificate of Title and as far as the evidence indicated, never left merely to undertakings in interpersonal contractual documents and these covenants were often expressed to affect the land and the proprietors and were therefore never couched in the form of personal covenants. He said there was an intention to retain the area as residential. Encumbrances showed that all lands affected, were not personal in nature and intended to run with the land. Dr. Barnett referred to The Law of Real Property by Megarry and Wade, Third Edition, P.767, on the question of annexation. He cited the case of Osbourne v. Bradley (1903) 2 Chancery, P.446; Rogers v. Hosegood 1903 All E.R. P.915. He also cited Newton Abbot Co-operative Society Limited v. Williamson and Treadgold Limited (1952) 1 All E.R. P.279. He submitted that the modern trend is that the burden as well as the benefit will run with the land in the absence of expressed annexation.

Mr. Scharschmidt for Hillsborough Limited, dealt in some detail with Building Schemes. He submitted that:

" Where land is subject to restrictive covenants, the benefit of such covenants can be acquired by subsequent transfers in one of three ways:

- (1) Where the benefit of the covenant was expressly annexed to the dominant land;
- (2) Where there was an effective assignment of the benefit;
- (3) Where both the dominant and servient lands are subject to a Scheme of Development."

He referred to Cheshire's Modern Real Property, 11th Edition,

P.5:

" The scheme of development comes into existence if land is laid out in blocks and sold to different persons, each of whom enters into restrictive covenants with common vendors that the land shall not be used for certain purposes."

He gave what he considered were the essentials of a building scheme and referred to Sale of Land in Australia by Helmore, 1971 Edition at P.170. He referred to the 5th Edition of Preston and Newsom, PP.36 to 40; to Megarry and Wade, 3rd Edition, P.760 and he argued that it was a question of fact whether a building scheme exists or not.

It is the court's view, on a perusal of the documents and on a consideration of the submissions made and the Authorities cited, that firstly, both benefit and burden are being transferred; secondly, these are attached to the land; thirdly, reciprocity of benefit and burden not confined to the land described as "Retreat". In my view the intention was to retain the character of the area and to retain it as a residential area. Once restrictions are imposed on Certificate of Title, they become binding on all transferees and subsequent parties.

I find that the covenant runs with the land and enures to the benefit of the respondents in this matter and their successors.

Finally, I may say for clarity that my answer to (a) of the motion is yes and that the restrictions are not personal and are enforceable.

May I hear from you Miss Phillips, Mr. Morrison, or Mr. Hylton? Other things may flow from what I have said here.

MISS PHILLIPS:

All I think I would like to say, sir, is that all the respondents are entitled to costs.

MR. HYLTON:

I don't think I could resist that.

MALCOLM, J:

There will be costs to the respondents to be agreed or taxed.