

C/S

SAINT VINCENT AND THE GRENADINES

IN THE HIGH COURT OF JUSTICE

SUIT NO.: 148 of 1996



BETWEEN: STEVE MINORS

PLAINTIFF

V

MILTON MAYERS  
VALERIA BYRON MAYERS

1ST DEFENDANT  
2ND DEFENDANT

G Bollers Esq for the Plaintiff  
E Robertson Esq and Ms S Robertson for the Defendants

Mitchell J

JUDGMENT

This case involved the interpretation of a deed and a ruling as to whether or not a clause in it is a restrictive covenant running with the land conveyed by the deed. The case was commenced by an originating summons issued out of the Registry of the Supreme Court on 23 April 1996. The summons was supported by an affidavit of the Plaintiff Steve Minors (hereinafter Mr Minors). The Defendant Milton Mayers (hereinafter Mr Mayers) replied by an affidavit sworn and filed on 23 May 1996. Mr Minors replied by an affidavit of 10 July 1997 which was filed too late to be considered. In preparing for the trial on 9 May 1997 the court gave directions that the affidavits of the parties were to be the evidence in the case. All affidavits were to be filed by 23 May 1997. The court also ordered the skeleton arguments of and the legal authorities relied on by the parties to be served and filed at least one week prior to the trial. I must thank both counsel in the case for their exhaustive research and clearly written presentations to the court on the evidence and the law which greatly assisted the court in dealing with the matter.

The facts are as follows. Mr Mayers and his wife (hereinafter the Mayers) are the owners of a 4 acre parcel of land which they have partitioned into building lots according to an approved Development Plan. The Mayers have laid out the land in lots for sale to different purchasers. The Mayers were promoting a scheme of development, also known as a development scheme, estate development, or building scheme (hereinafter the building scheme). Part of the concept of a building scheme is to ensure that all the lots are subject to the same restrictions. Each of the previous purchasers from the Mayers entered into similar covenants in their deeds from the Mayers restricting what they can do with their lots. Mr Minors was the purchaser of lot 25 in the building scheme. One of those restrictions in the Deeds given by the Mayers is the one in question in Mr Minors' deed. The restriction which is complained about is Covenant 4. It provides that all the buildings in the building scheme are to be designed by Mr Mayers.

Mr Mayers says he has in fact designed a house for Mr Minors. He claims these plans are in accordance with the instructions of Mr Minors. Mr Minors denies that he has ever approved any plans. I do not need to determine whether or not it is true that Mr Minors has approved the plans of Mr Mayers. I am sure the plans of Mr Mayers are in accordance with his concept for the building scheme that he and Mrs Mayers have in their mind. Mr Minors however has a problem with the plans of Mr Mayers. As a consequence, he has not built the building that Mr Mayers has designed for him. Perhaps he wishes to have another architect design another building for him. Perhaps he wishes to sell the lot free of the covenant. He has come to the court and asked for a determination as to whether Covenant 4 is a restrictive covenant that runs with the land. Let us now look at the Deed and the clauses that are in question.

Mr Minors purchased lot 25 for EC\$30,397.00 on 7 July 1994 by Deed of Conveyance 2401 of 1994. Recitals 3 and 4 of the Deed of Conveyance established that this lot being conveyed is part of a building scheme by these words:

"WHEREAS

...

3. The said hereditaments form part of the hereditaments and premises of the Vendors which the Vendors have laid out in lots as a building estate and [have] thereon constructed certain roads for the convenience of persons erecting houses on such estate and as the same is shown as and comprises lots Numbers 1 to 30 on a Plan prepared by McArthur Robertson Licensed Land Surveyor and approved and lodged at the Land and Surveys Department on the 6th day of November 1992 bearing registration number G 1548.
4. The Vendor has already sold to Purchasers and will sell to other Purchasers certain of the said Lots subject to the covenants on the part of each such Purchaser to observe similar stipulations as those set out in the Second Schedule hereto.

...

THIS IS THE SECOND SCHEDULE REFERRED TO HEREIN

AND IN PURSUANCE of the aforesaid agreement in this behalf the Purchaser to the intent that the burden of this Covenant may run with the said hereditaments hereby for himself and his heirs Covenant with the Vendors their successors and assigns as follows:

1. That the Purchaser will not undertake any industry or commercial business on the said hereditament such as (i) rum shops and other shops (ii) discotheques (iii) other forms of public entertainment or (iv) mechanical shops for repair of vehicles and

...

4. The Purchaser and the Vendors hereby agree that the Vendor will design, prepare, furnish and build the Purchaser's dwelling house on the said hereditaments at an agreed price after the said design has been approved by the Purchaser."

I am satisfied that identical covenants and terms are to be found in all of the Deeds given by the Mayers to purchasers of lots in the building scheme. The sole question for the court was whether the covenant set out at paragraph 4 of the 2nd Schedule above is a restrictive covenant that runs with the land enforceable as part of this building scheme. Mr Minors submits that this Covenant 4 is a personal contract between the parties to the Deed. It is not a covenant that runs with the land so as to bind his assignee. Mr Mayers submits that this covenant is part of the building scheme, and as such the benefit and the burden of Covenant 4 runs with the land.

The law is as follows. A covenant is a promise that is made under seal. At common law where there is privity of contract between the parties then they are bound by the ordinary law of contract, and the covenant is enforced by suing for damages or an injunction or for specific performance. At common law the benefit of a covenant runs with the land and passes to the covenantee's successors if

- (i) the covenant touches and concerns the land,
- (ii) the original parties intended the covenant to run with the land, and
- (iii) the suing successor owns the same legal estate in the land as the original covenantee.

At common law the burden of a covenant did not run with the land and the covenant could not be enforced against an assignee of the covenantor. A covenant can be enforced in equity in certain circumstances. These are:

- (a) it must be negative in nature, and not a positive one requiring the expenditure of money,
- (b) the covenantee must at the time of the creation of the covenant own land for the protection of which the covenant is made, and there must be a clear intention to bind the covenantor's land and,
- (c) the covenant must touch and concern the dominant land, ie, either affects the land as regards mode of occupation or such as per se affects the value of the land.


Once a scheme of development is found to exist, some of the rules governing the enforcement of covenants in Deeds relating to land are relaxed.

No one reading Covenant 1 in the 2nd Schedule above would have any difficulty in finding that that covenant satisfied all the requirements of an enforceable restrictive covenant. That is, it is negative in nature. Also, the Mayers at the time owned and still own land for the protection of

which the covenant applies. Further, the covenant touches and concerns land, ie, it affects the land as regards mode of occupation, and it also affects the value of the land. Restrictive Covenant 1 above is found in all of the Deeds of the purchasers of the lots in the building scheme. The Mayers would have no difficulty in enforcing Covenant 1 if it were breached. This being a building scheme, each of the other purchasers or any subsequent assignee of theirs could enforce Covenant 1. Covenant 1 would be perpetually enforceable by any owner of any property in the building scheme, unless its breach were to be ignored for a long time. Covenant 4, on the other hand, is more difficult. It is an agreement between Mr Minors and the Mayers for the latter to design, prepare, furnish and build a house on Lot 25. There is nothing negative about this covenant. It requires the Mayers to do the positive acts described. It also obliges Mr Minors to do the positive act of paying to design and build the house. It does not relate to the user of the land. If the Mayers were to die the covenant would be extinguished, it would not pass with any lands in the building scheme they retain to their heirs and successors. It is difficult to see how another lot owner in the building scheme would be able to enforce the covenant without the personal intervention of the Mayers. Covenant 4 is nothing more than a personal contract between Mr Minors and the Mayers. While Covenant 4 is found in all of the Deeds of all of the owners of lots in the building scheme, I find that it exists purely for the benefit of the Mayers. I find that Covenant 4 is not a restrictive covenant running with the land.

The fact that this finding causes inconvenience to the Mayers and to previous purchasers of lots in the building scheme is an unavoidable consequence. The Mayers may be advised to take steps to ensure that there are proper architectural and building contracts in place to be signed at the time of any conveyance (perhaps also containing revised covenants) to future purchasers of the remaining unsold lots. The contract contained in Covenant 4, meanwhile, is within a limited scope enforceable against Mr Minors. Of all the covenants in the Second Schedule it is only Covenant 4 that is by this decision unenforceable against an assignee of Mr Minors. The benefit and the burden of the other restrictive covenants, meanwhile, run with the land unless otherwise determined and are enforceable against Mr Minors or an assignee from Mr Minors. To that extent the existence of the building scheme is preserved.

The order is that the covenant set out in paragraph 4 of the Second Schedule to Deed of Conveyance 2401 of 1994 is not a restrictive covenant which runs with the land. Costs to the Plaintiff to be taxed if not agreed.



ID Mitchell QC

High Court Judge (Ag)

July 21 1997